

## CONSTITUTIONAL AMENDMENT 95: A BARRIER TO THE CORONAVIRUS PANDEMIC RESPONSE

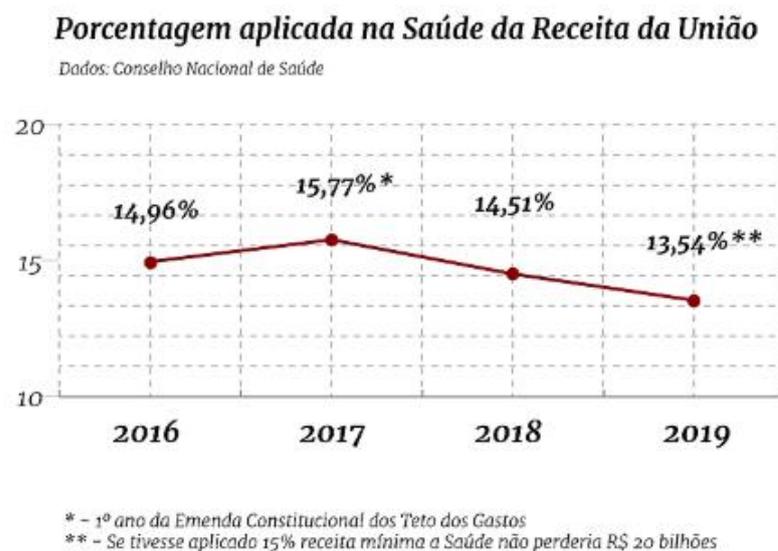
After four years of the Constitutional Amendment 95 (EC 95), of 2016, it is possible to register its drastic effects for the financing of social policies, with emphasis on health, education, housing, food security and social assistance. It also adds to its contribution to the increase in poverty, extreme poverty and worsening inequalities and its impact already proven to achieve the Sustainable Development Goals, agreed by the United Nations in 2015<sup>1</sup>.

The federal health budget has lost, since its implementation, approximately 30 billion reais. The guarantee rule, or constitutional remedy to guarantee the subjective right to health (article 196 of the Federal Constitution of 1988), linked financing to revenues (article 198, paragraph 2 of the 1988 Federal Constitution); with Amendment 95, financing started to be linked to the amount spent in the previous year, updated by inflation (article 110, ADCT of the 1988 Federal Constitution).

The data are from the National Health Council: in relation to the Union's revenues, health financing fell considerably in the face of budget unbundling. Considering the textual 15% of paragraph 2 of article 198, the loss of investment exceeded 13 billion reais in 2019.

In percentage terms, the application of resources to health policies is below the 15% floor requirement provided for in article 198, paragraph 2 of the Constitution: in 2018, it was 14.51% and, in 2019, 13.54%.

**Graph 1. Percentage of health investments in relation to the 2016-2019 Union revenue<sup>2</sup>**



(Data: National Health Council. \* - 1st year of Constitutional Amendment 95 / \*\* - If 15% of the floor revenue would be applied to health, it would not have lost 20 billion reais)

<sup>1</sup> Available at: <https://bit.ly/2wCuJ0p>

<sup>2</sup> Conselho Nacional de Saúde (CNS). “Saúde perdeu R\$ 20 bilhões em 2019 por causa da EC 95/2016”. 28.2.2020. Disponível em <<https://bit.ly/2K4DQdi>>.

In a Public Note released on March 12, 2020, the National Health Council demanded the immediate repeal of Constitutional Amendment 95, of 2016:

“The National Health Council (CNS) demands immediate repeal of Constitutional Amendment 95/2016, which removed funds from the Unified Health System (SUS), freezing investments until 2036. The need is strengthened in the face of the cases of the New Coronavirus (COVID-19 ) in Brazil. So far, according to a study by the CNS Budget and Financing Commission (Cofin), the loss to SUS has already reached R\$ 20 billion. Over two decades, the damage is estimated at R\$ 400 billion less”<sup>3</sup>.

It is thus confirmed that untying the financing of health policies, as required by Article 198 of the Constitution, to just correct the amount spent in the previous year on inflation, generated less investment.

In this way, the statement that Constitutional Amendment 95 would maintain the standard of financing health policy is undone. The substitution of the bonding of health financing, with the guarantee of a floor, linked to revenues by the investment of the previous year, adjusted for inflation, represented an evident impossibility of adequate unsustainability of health policies, making the underfunding of health policies, which was already serious, to take catastrophic proportions in a health crisis scenario, with the coronavirus pandemic (COVID-19) whose estimated spread in the country indicates rapid growth in the coming weeks, even with radical and urgent measures of containment, notification and treatment being taken.

The data indicate that the Brazilian Unified Health System (SUS), which has been underfunded for decades and emptied further of investments in the last 3 years (see Graph 1), is already suffering a high impact and the projections indicate intensification of stress due to the pandemic. It is already certain that, for example, with the estimated evolution of the pandemic, there will be no beds for hospitalization and intensive care for all those who need them in Brazil.

Data from the Federal Council of Medicine of 2018, indicate that only 10% of Brazilian municipalities have intensive care beds; in addition, most of them are concentrated in the Southeast (53.4%). Of the total of almost 15 thousand beds, 49% are public and 51% are in the private network. The recommendation of the World Health Organization is 2.4 beds per 10,000 inhabitants. In Brazil, the Unified Health System has 1 bed for every 10,000 inhabitants, less than half of what is recommended.

A report from Núcleo Jornalismo<sup>4</sup>, based on data from the National Register of Health Establishments (CNES), made available by the Ministry of Health, shows a reduction of 49

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<sup>3</sup> Available at: <http://bit.ly/38RcWQg>

<sup>4</sup> Núcleo Jornalismo. “Sus perdeu 49 mil leitos de internação hospitalar desde 2007”, 12.03.2020. Available at <<http://bit.ly/2wezdKy>>.

thousand hospital beds in the Unified Health System between 2007 and 2019, representing a reduction of 14.3% in supply.

**Table 2. Number of hospitalization beds in SUS (2007-2019)**

Type	dec.2007	dec.2019
Surgical	75.55	74.454
Clinical	107.02	106.794
Obstetric	48.309	38.799
Pediatric	54.326	38.191
Other Specialties	54.799	31.827
Day Hospital	4.148	4.903
Total	344.152	294.968

(Source: Núcleo Jornalismo, based on data from CNES/MS)

The official data thus shows: insufficient beds to meet a health emergency scenario; absolutely unequal distribution of health structure between regions and states of the federation; difficulty in accessing health resources by the rural population or those who live far from the capitals.

It is necessary to act and expand the capacity of the Unified Health System now.

Faced with this unprecedented health crisis, Brazil needs effective and qualified outpatient care, with the necessary capacities to properly treat mild cases. In addition, it needs a structure to quickly identify new cases, adopt the preventive and sanitary measures acquired; hospital beds for those who developed severe symptoms; and intensive care beds for the severe stage of the disease. This scenario, in view of the analyzes, is far from the Brazilian reality.

The State's capacity to respond to the pandemic is essential to contain and reduce its damage and, in addition to expanding testing, intensive care beds and health professionals, emergency actions in the area of social assistance and food security, with the expansion and urgent strengthening of the minimum income programs, such as Bolsa Família, BPC (Continuous Payment Benefit) and others such as the Bolsa Alimentação Escolar, will be decisive. Not only to enable actions of social distance at this time of the crisis, but for the scenario immediately after the peak of the epidemic, at a time still uncertain.

We recall that, for the great part of the Brazilian population that is unemployed or working in the informal market, in extremely precarious work relations, the pandemic will make the challenge of family survival even more dramatic, affecting the lives of millions of women, children and adolescents more perversely. We emphasize that the pandemic has a gigantic potential for destruction among the homeless population - a contingent that does not have national accounting data, but that, in studies and localized research, indicated that it was growing rapidly in several Brazilian cities due to the economic crisis - and of the population in

precarious settlements, with cuts in public housing policies and in sanitation areas that were also underfunded. Social assistance and food security policies are, therefore, fundamental and establish the line for many people between life and death.

To face Covid-19 and its consequences requires, in addition to the obvious need to recompose the financing of health policies, that the entire constitutional structure of social protection be and continue to be strengthened, since inequality is also a factor of aggravating the impact of disease and in turn prevents access to basic constitutional rights.

Such claims are supported by studies that show that poor populations have a worse general health status and are more vulnerable to the serious effects of viral infections such as influenza and coronavirus<sup>5</sup>. Recent data in China this year indicate, for example, that coronavirus infection can be 10 times more deadly in people with chronic diseases that, in turn, afflict the poorest<sup>6</sup>.

The vulnerability relationship evidenced by the sociology of epidemiology also correlates racial aspects that are of fundamental relevance in the Brazilian context, in which the majority of the population is black (55.8%). The absence of affirmative actions and effective public policies to overcome structural racism, leave a legacy of socioeconomic inequalities incompatible with the principle of equality and non-discrimination and with the material concept of democracy and the rule of law.

The finding can be illustrated by the fact that in 2018, according to the IBGE, 64.2% of the unemployed population and 66.1% of the underutilized population were black (blacks and browns). The average monthly income of black people was, in the same period, 73.9% lower than that of white people. Black women received, on average, less than half the salaries of white men (44.4%)<sup>7</sup>.

If these factors were not enough, which evidence the permanence of our racist social structure, data from the Ministry of Health itself, in 2017, demonstrate its impacts on child health, realizing that 50.7% of children up to 5 years of age who died from preventable causes were mixed race and black, while 39.9% were white.

In addition, the United Nations already indicates that the covid-19 pandemic is not gender neutral and will affect women distinctly, as they are subject to more severe economic costs and, like children, are more vulnerable to domestic violence. The increase in violence, in turn, both psychological and physical, will also impose greater demands on SUS.

Impacted Education. As in other countries, the coronavirus pandemic in Brazil has correctly led public education networks to suspend school classes across the country. Public networks that, for the most part, were already precarious, with overcrowded classes; lack of professionals; flat wages and weakened working conditions for teachers; insufficiency of

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<sup>5</sup> On the relationship between poverty, race and health vulnerability, see <https://rwjf.ws/3b4LmQS>

<sup>6</sup> Available at: <http://bit.ly/3d6b2P5>

<sup>7</sup> El País. “Mulheres negras recebem menos da metade do salário dos homens brancos no Brasil”. 13.11.2019. Available at: <<http://bit.ly/2WjQP2g>>

vacancies, especially in early childhood education; scrapped buildings and equipment; lack of teaching materials; disruption of school transport; insufficiency or lowering of the quality of school meals and the multiplication of interrelated social demands that reach schools, as the national data indicate.<sup>8</sup>

We remember that schools are the most capillary and everyday public equipment for almost the entire Brazilian population. According to calculations by the Brazilian Campaign for the Right to Education, since the beginning of austerity policies in 2015, aggravated by EC 95, education has today lost R\$ 99.5 billion (equivalent to about USD 20 billion), being R\$ 32.6 billion in 2019 alone (equivalent to about USD 7 billion).

With the closure of schools due to the pandemic, many mothers and fathers who continue to be called to work have nowhere to leave their children to work and many students will be left without school meals, intensifying the vulnerability of families. School meals play an important role in the daily lives of many students - although they vary in content and quality and for them periods without classes are equivalent to hunger: a threat throughout the year becomes a harsh reality to be faced. Despite the recent approval of a law that authorizes the distribution of foodstuffs purchased with resources from the National School Feeding Program (PNAE) to parents, mothers or guardians, during the period of suspension of classes due to emergency or public calamity, such measure is not capable of replacing the role of school meals and is far from guaranteeing food and nutritional security and the human right to food for all affected students.

According to IBGE, about nine million Brazilians between zero and 14 years of age in Brazil live in extreme poverty and 6,5% of the Brazilian population (13.5 million people) had an income of less than USD 1,90 PPC in 2018. In 2017, the Ministry of Health's Food and Nutrition Surveillance System (Sisvan) identified 207,000 children under five years of age with severe malnutrition in Brazil. The most recent IBGE Food Security survey, in 2013, pointed out that one in five Brazilian families had dietary restrictions or concerns about the possibility of not having money to pay for food. According to experts in the area of food security, these numbers have been increasing alarmingly in recent years, since the rates of poverty and extreme poverty and hunger are related phenomena. In addition, EC 95 had a strong impact on the entire Food and Nutrition Security policy, which has affected and will continue to affect the right to food of the Brazilian population, as shown in the 2019 report by Fian Brasil<sup>9</sup>.

The purchase of food is the main source of access to food in Brazil. However, programs that positively impact the population's income have had budget cuts or decreased access. This is the case of the Food Acquisition Program, which, according to data released in a study by Ipea (2019), contributed to an increase of R\$ 400.00 in the income of family farmers, and which had a 38% reduction in expenses incurred in 2016 to 2019. Worsening this situation, the

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<sup>8</sup> Available at: <https://gtagenda2030.org.br/biblioteca/relatorios-luz/>

<sup>9</sup> Available at: <http://bit.ly/2Qpe874>

government started to restrict access to the Bolsa Família Program, generating a queue of 1 million families awaiting a response to obtain the benefit.

Maintaining underfunded education is also pushing Brazilian children and adolescents, who are recipients of full protection and absolute constitutional priority, to poverty and hunger.

Currently, the country does not even have adequate resources to meet the current number of enrollments in basic education. As an example, the table below shows the large cut in resources of the FNDE (National Fund for the Development of Education), linked to the Ministry of Education, and responsible for policies and programs such as school meals, school transport, Pró Infância (intended for construction and renovation of daycare centers) and the purchase of teaching materials.

**Table 3. FNDE dismantling - end of federal collaboration (voluntary transfers to municipalities and states)<sup>10</sup>**

	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Food	4.712	4.873	4.900	4.815	4.526	3.963	4.179	4.164	4.155	4.155
Professional education	1.238	2.458	4.136	4.831	4.218	1.843	469	302	207	99
Basic education	0	8.143	8.151	7.787	5.992	4.413	5.032	4.589	4.903	4.546
Child education	1.450	2.693	2.799	3.548	531	551	174	182	124	70
Transf. Basic Ed.	21.671	22.665	19.442	18.440	17.917	17.166	16.477	16.188	17.138	11.482
Higher Education	0	0	131	143	267	294	345	626	832	361
<b>Total</b>	<b>34.088</b>	<b>42.919</b>	<b>40.902</b>	<b>40.607</b>	<b>34.223</b>	<b>29.037</b>	<b>27.164</b>	<b>27.093</b>	<b>27.779</b>	<b>20.992</b>

The data thus show that there is a serious reduction in the transfer of resources from the Union to the National Education Development Fund, aggravated by Constitutional Amendment 95 which, also in the wording given to article 110 of the Transitional Constitutional Provisions Act, promoted the untying of minimum revenues to be applied in actions for maintenance and development of education provided for in Article 212 of the Federal Constitution.

The Government has to fulfill its responsibility of guaranteeing an emergency school meal grant for students of public schools in the country and the resumption of conditions for the implementation of educational policies and programs - among them, the expansion of daycare

<sup>10</sup> Values in billions of reais. Source: SIOP - Integrated Federal Budget and Planning System

centers in the country and of higher education and the guarantee of school lunches and transportation - which had their resources drastically reduced after the enactment of the Amendment. It is urgent to resume the financing conditions of the National Education Plan (PNE), law 13.005 approved by the National Congress in 2014 as a supraparty effort and the result of intense mobilization of civil society, which establishes twenty structural goals for the expansion and improvement of the guarantee of the human right to quality education in the country.

Constitutional Amendment 95 - which was already draining federal investment in social policies - hurting the duty of progressivity and the essential core of social rights that make up the constitutional core clause - today presents itself as a real obstacle to the adoption of social protection measures during the pandemic of coronavirus, whose health, social, economic and political effects are not only immediate, in the year 2020, but will have an impact on the lives of the population in the coming years.

Constitutional Amendment 95, when imposing the New Tax Regime in order to reduce public debt, imposed limitations equivalent to all primary expenditures, without paying attention to the constitutional prioritization given to social policies as a remedy (or guarantee rule) for social rights which undeniably make up the list of immutable clauses (article 60, paragraph 4, IV Brazilian Constitution 1988), as well as the duty of progressivity that inform social rights under article 2.1 of the International Covenant on Economic, Social and Cultural Rights, of which Brazil is part.<sup>11</sup>

As evidenced by the data presented, Constitutional Amendment 95 seriously affected the Union's investment in social rights, deflecting the public duty to guarantee them in a universal and progressive way, in addition to accentuating social and regional inequalities, given the central role that the Union exercises in complementing and guaranteeing the financing of such policies with transfers to subnational bodies - states and municipalities. Furthermore, it did not achieve, nor did it approach, the main objective disseminated as the main reason for its approval, which would be to reduce the public debt and the annual amount of its service. On the contrary, in the last four years the public debt increased from 73% of GDP to 79%, with an average annual service cost above 60% of all Brazilian exports. In other words, the cuts in the areas essential for human development were directed to other economic sectors, with results well below expectations as the country's economy was practically stagnant for three years, without recovering from the previous decrease of 2014 and 2017<sup>12</sup>. Therefore, EC 95 has so far not shown any positive results according to the original advertisement that guaranteed its approval in the National Congress.

Such measures violate Article 3, III of the Constitution, which is based on the fundamental objective of the Brazilian Republic to reduce social and regional inequalities, as well as the preservation of life and equality, inserted in the caput of Article 5; the right to health, food and education provided for in the caput of article 6; the subjective rights to health and education

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<sup>11</sup> Enacted through Decree no. 591, of July 6, 1992.

<sup>12</sup> Available at: <https://www.ceicdata.com/datapage/pt/indicator/brazil/real-gdp-growth>

provided for in articles 196 and 205 and their respective financing guarantees provided for in articles 198 and 212, respectively; from the rights of children and adolescents to absolute priority, under the terms of article 227; as well as the right of the elderly to be protected, under the terms of article 230 of the Constitution, all immutable clauses inserted in the hypothesis of article 60, §4, IV, all of the Federal Constitution of 1988.

Now there is a public health emergency over the new coronavirus pandemic and all its socioeconomic effects. All violations of the Constitution and human rights principles and treaties are even more evident and serious.

There is nothing to guarantee that, during the public health emergency caused by the coronavirus pandemic, all necessary measures will be adopted that prove to be sufficient to face and guarantee the right to health, education and social protection for all Brazilians. Only the constitutional linkage is capable of maintaining investment at the level necessary to restore the financing of essential social protection policies and prevent the worsening health, social, economic and political crises from further undermining the capacity of the Brazilian State to guarantee rights to its citizens.

It is not enough to open extraordinary credit in the 2020 budget, since this credit depends on political will, it will be at a level much lower than that required by the Constitution and cannot be adopted again - given precisely its extraordinary character and due to legal prohibition.

The forecast is that this is a long and persistent crisis, which will brutally affect the Brazilian economy, generating unemployment in an already precarious scenario, aggravating regional and social inequality and being even more cruel to the most vulnerable. Plans to contain public expenditures in social areas will be abandoned, as it has become necessary and crucial for the State to invest heavily to recover the paralyzed economic activities in the country. The cost to public coffers will be so great that the very concept of fiscal balance will be questioned by the new reality imposed by the Covid-19 pandemic on the country in the medium and long term.

The permanence of full effects of Constitutional Amendment 95 for the year 2020, and especially for the following years in which the effects of the crisis will remain, limits the measures that can be adopted by the State and that are necessary to face the emergency, since prevent the opening of supplementary credit and the extrapolation of primary expenses (art. 107, I and §1, II, §§3rd, 4th and 5th of the Transitional Constitutional Provisions Act in the wording given by EC 95), being allowed only the adoption of extraordinary credits for this year and the total absence of tools to increase spending to 2021.

It is necessary to allow an increase in public spending to contain the pandemic and its socioeconomic consequences in Brazil, with the necessary change in the primary result target.

Brazil suffers even more in the face of a scenario of political abnormality: with a President of the Republic who denies the seriousness of the pandemic, violates isolation recommendations from the Ministry of Health and encourages and participates in agglomerations. You cannot deal with the emergency that is imposed by assuming rational behavior by the federal executive branch: it will not happen.

## **REQUESTS**

In view of the above, that the effects of the COVID-19 pandemic require short, medium and long-term responses, it is necessary that fiscal policies be revised under the premise of essentiality that COVID-19 enhances. This will require a redefinition in the allocation of public resources so that they prioritize and adequately finance the sectors hard hit by EC 95, specifically in the areas of health, education and social assistance. For this reason, and we ask the United Nations Special Procedures and the Inter-American Commission on Human Rights to recommend to the Brazilian State:

1. Immediately revoke Constitutional Amendment 95, ceasing its terrible effects on the set of social policies, in the sense of:
  - a. immediately recover health financing through supplementary credits, reallocation of resources or adoption of extraordinary credits in 2020 and in the Budget Guidelines Law of 2021, under the terms of article 198 of the Federal Constitution;
  - b. restore the funding of maintenance actions and development of education through additional credits, extraordinary credits or resource reallocation in 2020 and the Budget Guidelines Law 2021, under Article 212 of the Constitution;
  - c. restore the financing of social assistance and food security actions through the adoption of supplementary credits, extraordinary credits or reallocation of resources in 2020 and in the Budget Guidelines Law of 2021, pursuant to articles 203 and 6 of the Constitution.
2. Require information from the Brazilian government on public investment in health for the control of the pandemic, availability of funds as well as availability of disaggregated data on people affected by the disease considering variables of race, color, gender, income, age and geographic location;
3. To issue a public press release about the situation, recommending to the Brazilian government the adoption of comprehensive public policies specifically aimed at the population in extreme poverty so that no one is left behind in facing the pandemic in Brazil.